No. 85-1347

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER

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Question Presented for Review

Do either the Confrontation or Compulsory Process Clauses of the Sixth Amendment invariably require, as the Supreme Court of Pennsylvania has concluded, the pretrial disclosure of confidential child protective service records to a defendant in a state rape-incest prosecution on the strength of his speculative claim of need and notwithstanding the fact that the records were neither possessed nor employed by the prosecutor at any stage of the criminal proceeding?

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BRIEF FOR PETITIONER

Opinions Below

The Opinion of the Supreme Court of Pennsylvania (Pet. for Cert. App. A) is reported at _____ Pa. _____, 502 A.2d 148 (1985). The Opinion of the Superior Court of Pennsylvania (Pet. for Cert. App. B) is reported at 324 Pa. Super. 557, 472 A.2d 220 (1984).

Statement of Jurisdiction

The Judgment of the Supreme Court of Pennsylvania was entered December 11, 1985 (Pet. for Cert. 48a). The petition for writ of certiorari was filed February 10, 1986, and certiorari was granted May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Pennsylvania Statute Involved

Act 1975, November 26, P.L. 438, No. 124, §15 provides:

> Confidentiality of Records.
>
> (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:
>
> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physician or the director or his designee suspect the child of being an abused child.
>
> (3) A guardian ad litem for the child.
>
> (4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
>
> (5) A court of competent jurisdiction pursuant to a court order.

* * *

Statement of the Case

A. Statement of the Proceedings

Respondent, George F. Ritchie, was charged by Information filed August 17, 1979, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with Rape,[1] Involuntary Deviate Sexual Intercourse,[2] Incest,[3] and Corrupting the Morals of Minors[4] in four respective counts. The matters were tried to a jury, and on November 13, 1979, respondent was adjudicated guilty as charged.

Respondent was sentenced January 8, 1981, to terms of incarceration of three (3) to ten (10) years for Rape and Involuntary Deviate Sexual Intercourse, to be served concurrently; additional terms of two and one-half (2½) to five (5) years were imposed at the remaining counts, also to be served concurrently with those imposed at Counts One and Two.

On February 3, 1984, the Superior Court of Pennsylvania rejected respondent's appellate claims regarding the evidentiary sufficiency of the prosecution's case and the trial court's disposition of certain evidentiary matters not here relevant. However, the judgments of sentence were vacated, and the case was remanded to the trial court with directions to "review

[1] 18 Pa. C.S. §3121 (Pennsylvania Crimes Code). Rape is a felony of the first degree punishable by a term of imprisonment, the maximum of which is more than ten (10) years. 18 Pa. C.S. §106(a)(2).

[2] 18 Pa. C.S. §3123. Involuntary Deviate Sexual Intercourse is a felony of the first degree.

[3] 18 Pa. C.S. §4302. Incest is a misdemeanor of the first degree punishable by a term of imprisonment not to exceed five (5) years. 18 Pa. C.S. §106(a)(6).

[4] 18 Pa. C.S. §6301. Corruption of Minors is a misdemeanor of the first degree.

the CWS records *in camera* to determine whether they contain any statements made by Jeanette regarding abuse." *Commonwealth v. Ritchie,* 472 A.2d at 226 (Pet. for Cert. 45a). Respondent—through counsel—was then to be permitted to review, in their entirety, those records to which he had been denied pretrial access "in order to argue the relevance of the material in accordance with [the trial judge's] decision." *Id.,* 472 A.2d at 226 (Pet. for Cert. 46a).

The Commonwealth thereafter sought further appellate review of the Superior Court's remand order. The question presented and argued to the Supreme Court of Pennsylvania was "[t]o what extent may a defendant in a child rape-incest prosecution be authorized pretrial access to records or files prepared pursuant to the reporting requirements of the child protective services law for his possible use at trial to impeach or discredit a witness-victim?" (Brief for Appellant at 3, *Commonwealth v. Ritchie, supra*).

The Supreme Court of Pennsylvania, by an Order dated December 11, 1985, affirmed the Superior Court's disposition of the case (Pet. for Cert. 48a), persuaded apparently by respondent's contention that the trial court's denial of his pretrial request for production of the disputed materials deprived him of his rights to confrontation and compulsory process guaranteed by the Sixth Amendment. *Commonwealth v. Ritchie,* 502 A.2d at 153 (Pet. for Cert. 12a). The trial court was directed to grant defense counsel's access to the child protective service files in order "to argue to the trial court what use, if any, could have been made of the files in cross-examining the complainant *or in presenting other evidence.*" *Id.,* 502 A.2d at 153-54 (Pet. for Cert. 12a-13a). (Emphasis supplied).

B. Statement of the Facts

The charges against respondent arose following the disclosure by his then thirteen-year-old daughter Jeanette, made in confidence to an older cousin, that she had been subjected to her father's sexual depredations over a period of about four (4) years (NT 33-35, 50, 132-133; JA 14a-15a, 24a).[5] The cousin shared this confidence with her mother, the victim's aunt (NT 133-134), who ultimately escorted the victim to police headquarters where a formal complaint was made (NT 52-55; JA 25a-27a). Specifically, the victim alleged that on June 11, 1979, respondent forced her to fellate him and then compelled her to submit to vaginal intercourse (NT 24-27, 32-34; JA 8a-11a, 13a-15a).

In pretrial pleadings, respondent initially sought discovery from the Commonwealth of "results or reports of scientific tests, expert opinions . . . or other physical or mental examination of Jeanette Biles [*sic*]." (JA 76a). Thereafter respondent subpoenaed Child Welfare Services (CWS)[6] for "records pertaining to Jeanette Bills, a.k.a. Jeanette Ritchie." *Ibid.* Apparently meeting with no success, respondent—through counsel—filed a pleading captioned Motion for Sanction, averring, *inter alia*, that CWS personnel "absolutely refused to recognize the authority of the subpoena." (JA 73a).

[5] Transcript of notes of testimony at trial, November 7, 1979.

[6] CWS is the Allegheny County child protective service agency charged with the responsibility of monitoring and investigating reports of suspected child abuse. The agency has since been redesignated as Children and Youth Services (CYS).

The trial judge convened a pretrial conference, in chambers, to hear argument on the motion. In the course of the proceeding, counsel for respondent attempted to persuade the court that:

> There is possible witnesses available out of these reports. [sic] . . . There is a medical report in that file that I know about. The girl was examined by a doctor in September, 1978. I'd like to see the doctor's report. . . . That physical examination was taken on behalf of Child Welfare Services. All I know is that [CWS] received a complaint someone was mistreating this girl. They went down and interviewed this girl . . . and they asked the father . . . They gave the father a report [form?] to take her to a doctor and have the doctor examine this girl. The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic]. . . . There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-6, 10; JA 65a-66a, 69a).[7]

CWS, represented at the pretrial proceeding by an Assistant County Solicitor and an agency record custodian, explained that the agency's files contained no records of a medical examination of the victim (HT 5; JA 65a-66a). Respondent's counsel, however, insisted that ". . . there may not be anything [in these files], but they [CWS] have it. . . ." *Ibid.* The Assistant County Solicitor

[7] Transcript of hearing on pretrial Motion for Sanction, October 23, 1979. This hearing was not part of the appellate record before the Superior Court prior to its February 3, 1984, judgment and order. The proceeding was recorded but not transcribed until February, 1984, at the request of the Commonwealth. Subsequently, the transcript was made a part of the record reviewed by the Supreme Court of Pennsylvania.

responded, "Those are the records of the agency." *Ibid.* The CWS record custodian informed the trial judge that the agency's involvement with the victim did not commence until June 22, 1979 (HT 6, 8; JA 67a, 67a-68a). With respect to the non-medical materials sought by respondent's counsel, the trial court observed that "... you are not entitled [to review the agency files] because you are not making specific allegations that can be verified or determined." (HT 10-11; JA 69a-70a). The trial judge concluded that the medical records did not exist and entered the following Order:

> And now, October 23, 1979, after hearing in chambers, the Court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by [the agency] that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the [agency] being present at the hearing.

(HT 15; JA 72a). Respondent's counsel immediately objected to the Order, saying that "the court did not review the records." The trial judge retorted, "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There were no medical records that the court reviewed, and that is what we were told." (HT 15-16; JA 71a-72a).

In directing the trial court to reconvene a hearing and to grant counsel access to the disputed records, ostensibly for the narrow purpose of arguing their relevance in accordance with the trial court's *in camera* determination, the Superior Court cited *Davis v. Alaska*, 415 U.S. 308 (1974), for the proposition that where there is tension between a defendant's right of confrontation and a state's interest in insuring the confidentiality of sensitive records, a delicate balancing must occur. The

court concluded, however, "that the need for confidentiality in this case must ... yield to appellant's right of confrontation." *Commonwealth v. Ritchie*, 472 A.2d at 225 (Pet. for Cert. 42a-43a).

The Supreme Court of Pennsylvania's affirmance was premised on the Sixth Amendment "counters" of the right of the accused to confront the witnesses against him and to have compulsory process for obtaining witnesses in his favor, *Commonwealth v. Ritchie*, 502 A.2d at 151 (Pet. for Cert. 8a). Following a review of several of this Court's decisions in which Sixth Amendment questions were presented, the Pennsylvania Court concluded that *Davis v. Alaska* was the federal decision which was dispositive of the controversy. Applying *Davis*, the court held that the "counters" of confrontation and compulsory process tipped in favor of the respondent. *Id.* at 502 A.2d at 152-153 (Pet. for Cert. 10a, 12a).

Summary of the Argument

In 1979, respondent was charged with various sexual offenses, including rape and incest, involving his then thirteen-year-old daughter. Prior to trial, defense counsel sought court permission to review certain child protective service records concerning the victim and her family which the county agency had declined to surrender on the authority of a confidentiality provision in the Pennsylvania child protective services law. Counsel's request was rebuffed by the trial court following a preliminary review of the records, *in camera*, for evidence of a medical examination of the child-victim believed by counsel to have taken place some nine months before respondent's arrest. The Court concluded that the medical examination was not in the child's file, and counsel's explanation that the records might contain potential witnesses or information useful or otherwise favorable to the defense was rejected as too vague and speculative.

A. The Supreme Court of Pennsylvania's conclusion that the pretrial denial of defense access to presumptively confidential records was a violation of rights protected by the Confrontation Clause was erroneous, based as it was on a misinterpretation of *Davis v. Alaska*. The Pennsylvania Court incorrectly assumed that the constitutional flaw in *Davis* was the trial court's pretrial protective order precluding discussion of a prosecution witness' juvenile record. In fact, this Court faulted the trial court in *Davis* for the limitation it later imposed *at trial* on the scope of defense counsel's cross-examination. *Id.*, 418 U.S. at 312-14.

The right to confrontation is basically a trial right. *Barber v. Page*, 390 U.S. 719, 725 (1968). The privilege is not properly invoked at pretrial proceedings not involving guilt or innocence. *McCray v. Illinois*, 386 U.S.

300, 311 (1967). The Confrontation Clause protects an accused's literal right to confront adverse witnesses at trial and to subject their testimony to cross-examination as a means of exposing the fact-finder to potentially unfavorable inferences regarding the witness' credibility or the substance of the prosecution's case. *Delaware v. Fensterer*, _____ U.S. _____, 106 S.Ct. 292, 294 (1985) (*per curiam*).

In the present case, the prosecutor made no contested attempt to employ hearsay, and the trial court placed no pretrial limitation on the breadth of cross-examination (NT 56-93, 107-127; JA 27a-49a, 49a-61a). The Supreme Court of Pennsylvania erroneously and prematurely applied the Confrontation Clause analysis in the context of a *pretrial* order restricting respondent's *pretrial* access to presumptively confidential records.

B. The Supreme Court of Pennsylvania's conclusion that the pretrial disclosure of the child protective service records was constitutionally compelled is clearly erroneous in view of respondent's failure preliminarily to establish the materiality, in the constitutional sense, of any of the information contained in those records.

This Court's seminal decision in *Washington v. Texas*, 388 U.S. 14, 23 (1967), contained intimations that a violation of the constitutional right to compulsory process could not be established in the absence of a preliminary showing that the evidence sought was relevant and material. In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), the Court acknowledged its reliance on due process cases for the materiality requirement, cases involving "what might loosely be called the area of constitutionally guaranteed access to evidence." Under those decisions, defendants are constitutionally privileged to request and receive disclosure of evidence which is favorable to the defense

and relevant to guilt or punishment. *See, Brady v. Maryland*, 373 U.S. 83 (1963) and progeny.

The mere possibility that the undisclosed information might have assisted the preparation of a defense does not, however, establish materiality in the constitutional sense. *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). The trial court's preliminary review of the records failed to disclose the medical records sought, and counsel's request for other information was rejected as lacking in the required specificity (HT 10-11, 15-16; JA 69a-70a, 71a-72a). Because of the obvious and diminished opportunity to establish materiality in cases like the present, a relaxation of the specificity required might be appropriate, but not its dispensation. *Valenzuela-Bernal*, 458 U.S. at 870.

Respondent's failure to describe events to which a potential witness *might* testify, or the relevance of the events to the crime—some factual description of the material evidence—cannot under the Compulsory Process Clause satisfy the preliminary showing what would have entitled him to pierce the confidentiality of the child protective service record. The request countenanced by the Supreme Court of Pennsylvania is a classic fishing expedition disapproved by this Court. *See United States v. Nixon*, 418 U.S. 683, 700 (1974).

C. The pretrial disclosure of confidential records threatens the compelling state interests of identifying, protecting and treating child victims of physical and sexual abuse and undermines the stated legislative purpose of encouraging more complete reporting of suspected abuse. The preeminence of the reporting function is recognition of the fact that frequently only a "third person—a friend, a neighbor, a relative, or a professional—recognizes the child's danger and reports

it. . . ." Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill.L.Rev. 458, 464 (1978).

The Pennsylvania Child Protective Service Law contains elaborate procedural mechanisms to implement the state's interest, and the confidentiality provision of the law is designed to protect that interest. Although amendments to the law which postdate the present litigation ostensibly provide law enforcement officials additional opportunities to request and receive child protective service records, they do not provide *carte blanche* access to sensitive, confidential files.

The Pennsylvania Court's *per se* rule granting the accused the absolute privilege to demand disclosure of confidential records is a needlessly drastic remedy. The order will permit disclosure of information which has been divulged on the strength of representations of its confidentiality. The potential impact on the privacy interests of the victim, her family, and individuals who cooperated in the agency investigation is incalculable. Moreover, the order is offensive to the traditional role of the trial court, denigrates its authority, and directly conflicts with *United States v. Nixon*, 418 U.S. at 714. The Pennsylvania Court's order ignored the less drastic alternative of permitting the trial court to make a preliminary determination of the materiality and sealing the record for subsequent appellate review. *In re Robert H.*, 199 Conn. 693, 509 A.2d 475 (1986).

ARGUMENT

I. The Supreme Court of Pennsylvania has misconstrued the application and scope of the Confrontation and Compulsory Process Clauses of the Sixth Amendment.

A. Pretrial denial of defense access to statutorily privileged records does not implicate the Confrontation Clause absent a subsequent limitation on the scope of cross-examination of prosecution witnesses at trial.

In view of the fact that the Supreme Court of Pennsylvania relied on *Davis v. Alaska* for its conclusion that respondent's right of confrontation required the disclosure of confidential child protective service records, a preliminary examination of the Court's analysis is in order. The Court recognized the "concern [expressed in *Davis*] that the effect of the state's confidentiality provision may have been to allow the testifying witness to give a questionably truthful answer, and to prohibit the defendant from testing the truth of the testimony through the process of cross-examination." *Commonwealth v. Ritchie*, 502 A.2d at 152 (Pet. for Cert. 10a). Of course, the confrontation violation in *Davis* arose from the limitation placed on defense counsel's right to inquire *at trial* into the prosecution witness' juvenile probationary status, his protestation of unconcern that he might have been a suspect in the burglary, and his denial of previous police exposure. *Davis v. Alaska*, 415 U.S. at 313-14.

In applying *Davis* to the present case, the Supreme Court of Pennsylvania found "that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him." *Ritchie*, 502 A.2d at 153 (Pet. for Cert.

12a). The Court's discussion, in the Commonwealth's view, is premised on the assumption that the constitutional error in *Davis* arose from the trial court's grant of a protective order to prevent reference to the witness' juvenile record. The *Ritchie* court reasoned, apparently, that respondent's confrontation privilege was abridged by the trial court's refusal to permit defense counsel's pretrial access to the child protective service records, thus denying him the opportunity to review the records "with the eyes and perspective of an advocate." *Ibid.*

In *Davis*, as in the present case, the confrontation issue arose pretrial, but there the analogy ceases. The witness' juvenile probationary status became a concern in the course of the *voir dire* of prospective jurors. At this stage of the proceeding the prosecutor sought a protective order to preclude further discussion of the witness' prior juvenile adjudication. (Brief for Petitioner at 8, *Davis v. Alaska*). This Court, however, faulted the trial court in *Davis* for the limitation imposed *at trial* where defense counsel was prevented from effectively "pursuing a relevant line of inquiry." *Davis v. Alaska*, 415 U.S. at 312-14. In contrast, defense counsel in the present case was not limited on cross-examination by the hearing court's pretrial order. No subsequent restrictions on any relevant line of inquiry were imposed. Moreover, defense counsel did not renew his request at trial for disclosure of the disputed records.

"The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for a jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. at 725. *Cf. McCray v. Illinois*, 386 U.S. at 311 (compulsory disclosure of informer's identity has never been required where issue

is preliminary one of probable cause and guilt or innocence is not at stake); *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), (defendant's exclusion from mid-trial "viewing" held not violative of Confrontation Clause). *See also, United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984), ("no court of appeals ha[s] extended the sixth amendment right of confrontation to an evidentiary suppression hearing").

Only last term, this Court explained that its confrontation decisions reflected two areas of concern: a longstanding solicitude for the accused's literal right to confront adverse witnesses at trial and its reluctance to approve limitations on a defendant's right to expose the factfinder, through cross-examination, to facts from which unfavorable inferences might be drawn regarding the prosecution witness' trial testimony. *Delaware v. Fensterer*, 106 S.Ct. at 294.

This Court concluded that Fensterer's Confrontation Clause claim concerning the inability of the prosecution's expert witness to recall the basis for his in-court testimony—and its resulting frustration of counsel's attempts to test the witness' theory through cross-examination—fell into neither category. The prosecution proffered no hearsay evidence, and there was no restriction on the scope of cross-examination. *Id.*, 106 S.Ct. at 294-95. This Court further observed that "[g]enerally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective. . . ." *Id.*, 106 S.Ct. at 295 (emphasis in the original).

Similarly, the present case appears to be a categorical orphan, falling within no orthodox understanding of the Court's Confrontation Clause decisions. The prosecutor made no contested attempt at trial to employ hearsay,

and the trial judge placed no impediment upon the breadth of trial counsel's cross-examination of prosecution witnesses. The Commonwealth submits, consequently, that the Supreme Court of Pennsylvania's analysis of the Sixth Amendment's "counter" of the right of confrontation was clearly erroneous, manifesting a superficial understanding of this Court's relevant Confrontation Clause decisions, and was prematurely applied in the context of a *pretrial* order restricting respondent's *pretrial* access to presumptively confidential material.[8] Accordingly, the Commonwealth respectfully urges this Court to reject the Supreme Court of Pennsylvania's analysis of the applicability of the Confrontation Clause.

B. Respondent made no preliminary demonstration that the CYS records were relevant, material, or otherwise necessary to his defense, hence the Supreme Court of Pennsylvania's conclusion that their pretrial disclosure was constitutionally compelled is clearly erroneous.

This Court has suggested that its decision in *Washington v. Texas, supra*, contained intimations that a violation of the constitutional right to compulsory process could not be established in the absence of a preliminary showing that the testimony sought was relevant and material. *United States v. Valenzuela-Bernal*, 458 U.S. at 867. Acknowledging, however, that the pedigree for the requirement of materiality appears in decisions involving "what might loosely be called the area of constitutionally guaranteed access to evidence,"

[8] It is apparent, however, from the remand order directing the trial court to grant respondent access to the files in order to argue what use could have been made of the material "in presenting other evidence," *Ritchie*, 502 A.2d at 153-54, that the Supreme Court of Pennsylvania considered, alternatively, the application of the Compulsory Process Clause. The Commonwealth addresses that aspect of the case *post*.

ibid., this Court canvassed and discussed decisions specifically relying on the Due Process Clause of the Fifth Amendment.

Defendants are constitutionally privileged to request disclosure by the prosecution of evidence which is favorable to the accused and relevant to the guilt or punishment phase of a criminal prosecution. *Brady v. Maryland, supra; Moore v. Illinois*, 408 U.S. 786 (1972); *United States v. Agurs, supra.* However, "[t]he mere possibility that an item of undisclosed information might have helped the defense[.] .. does not establish 'materiality' in the constitutional sense." *Id.*, 427 U.S. at 109-110. The federal appellate courts show no inclination to permit defendant's to rummage through state or federal governmental files on the bare contention that otherwise confidential material *might* have been useful in preparing a defense. *See, e.g., United States v. Gel Spice Co.*, 773 F.2d 427 (2d Cir. 1985), *cert. denied*, _____ U.S. _____, _____ Cr.L. _____ (1986) (internal Food and Drug Agency documents); *United States v. Krauth*, 769 F.2d 473 (8th Cir. 1983) (United States Postal Service "mail cover" records); and *Camitsch v. Risley*, 705 F.2d 351 (9th Cir. 1983) (state juvenile case files).

Respondent's preliminary showing of materiality, such as it was, consisted of the following representations by his trial counsel:

> There is possible witnesses available out of these reports. [sic]
>
> * * *
>
> There is a medical report in that file that I know about.
>
> * * *

> The girl was examined by a doctor in September, 1978. I'd like to see the doctor's report.
>
> * * *
>
> That physical examination was taken on behalf of Child Welfare Services. All I know is that [CWS] received a complaint someone was mistreating this girl. They went down and interviewed this girl . . . and they asked the father . . . They gave the father a report [form?] to take her to a doctor and have the doctor examine this girl.
>
> * * *
>
> The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic].
>
> * * *
>
> There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-7, 10; JA 65a-67a, 69a).

The trial court, relying in part on representations by CYS representatives and in part on its personal review of the materials surrendered, concluded that the medical records sought were not in the agency's possession. Moreover, because respondent's counsel had not made "specific allegations that [could] be verified or determined[,]" he was not permitted to review the agency files for additional material (HT 10-11, 15-16; JA 69a-70a, 71a-72a). It is starkly evident that respondent's expectations of discovering "possible" witnesses "favorable to the defendant" in the CYS files were accompanied by not the scantest representation regarding either the identity of potential witnesses or even what aspect of the case they might be testimonially competent to describe.

The Commonwealth notes additionally that the materiality of the report of the September 1978 medical examination is not apparent. Its potential as an impeachment tool, it seems, would be manifested by the victim's failure to report sexual abuse by her father when she had the opportunity to be heard by a presumably sympathetic audience. However, the victim testified that she did not inform either the caseworker or the examining physician that she was being sexually victimized (NT 125-126; JA 60a-61a). The jury, of course, was free to consider her omission. With respect to the use of the medical examination as a discovery tool, the Commonwealth submits that respondent surely was in a favorable position to identify the CWS caseworker who examined the victim and her brothers in their home (NT 92, 244-45; JA 48a). Moreover, respondent knew the identity of the examining physician (HT 6; NT 107; JA 66a; 49a), and he knew or could have discovered the identity of the police officers who received and processed the formal complaint of sexual abuse in June 1979 (NT 52-53, 245; JA 25a-26a). Finally, respondent's own trial testimony contained an insinuation that the child abuse report which led to CYS' examination of the child was triggered because, he said, his daughter was reportedly "messing around" with a young, unidentified male (NT 246).

Respondent could have, the Commonwealth contends, asked the trial court to review the CYS files for statements or other references by any of these potential witnesses, and, based on the issues to be determined at trial, he could have made some plausible effort to establish the constitutional materiality of the requested information. Manifestly no such preliminary showing was made, and, consequently, the trial court simply had no adequate basis upon what to exercise its discretion.

A particularly vexing problem concerning materiality arises in the context of cases like the present. Here, as in the informer cases or in the deported alien cases, see *Roviaro v. United States,* 353 U.S. 53 (1957); *McCray v. Illinois* and *United States v. Valenzuela-Bernal, supra,* respondent had no way realistically to determine the actual contents of the CYS records. This Court, however, suggested in *Valenzuela-Bernal* that the diminished opportunity to establish materiality in such cases "may well support a relaxation of the specificity required . . . [but] we do not think that it affords the basis for wholly dispensing with such a showing." *Id.,* 458 U.S. at 870. The effect of the Court's ruling in *Commonwealth v. Ritchie, supra,* is, nevertheless, to dispense with such a showing.

This Court has suggested a formulation which provides adequate guidance to defense counsel on the presentation of a plausible demonstration of materiality regarding potentially discoverable matter to which criminal defendants, as in the informer cases, otherwise have no ready access.

> In such circumstances, it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.[9]

United States v. Valenzuela-Bernal, 458 U.S. at 871 (emphasis in the original). Thus, the defendant in such a situation "necessarily proffers a *description* of the material evidence rather than the evidence itself." *Id.* at 874 (emphasis supplied).

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[9] *Cf.,* P. Westen, *Compulsory Process II,* 74 Mich.L.Rev. 191, 274-75 (1974) (sufficient to relate that potential witness was present at scene of crime, participated in crime, or was an accomplice of defendant; but there must be *some* factual basis for the request).

Even under this undemanding standard, respondent's speculative claim of need did not meet the preliminary showing of materiality necessary to entitle him to invoke the Compulsory Process Clause. In venturing to interpret the United States Constitution to dispense with this demonstration, the Supreme Court of Pennsylvania Court has not only erred, but it appears to have countenanced the classic "fishing expedition" disapproved in this Court's prior disclosure cases. *See United States v. Nixon*, 418 U.S. 683, 700 (1974); *Jencks v. United States*, 353 U.S. 657, 667 (1967); *cf., United States v. Weiner*, 578 F.2d 757 (9th Cir. 1978) (request for "anything exculpatory" is equivalent to no request at all, and trial judge need not accord the slightest heed to such a shotgun approach); *McKenney v. Wainwright*, 488 F.2d 28, 30 (5th Cir. 1974) *cert. denied*, 416 U.S. 973 (1974) (denial of request for continuance to discover "witnesses who could aid in the defense of the case" not violation of Compulsory Process Clause).

Under these facts, respondent has failed to establish a violation of the Compulsory Process Clause of the Sixth Amendment. The decision below to the contrary is a clearly erroneous interpretation by a state court of established federal constitutional principles.

C. The pretrial disclosure ordered by the Supreme Court of Pennsylvania threatens the primary mechanism by which the Commonwealth identifies, protects, and treats the child victim of physical and sexual abuse; the disclosure order undermines the stated legislative policy of encouraging more complete reporting of suspected abuse.

Although the Supreme Court of Pennsylvania is technically correct in declaring that the Child Protective Services Law[10] (CPSL) "was enacted to identify and

[10] Act 1975, November 26, P.L. 438, No. 124 §§1-24, *as amended* (11 P.S. §2201 *et seq.*, Purdon, Supp. 1986).

protect children suffering from abuse and to provide rehabilitation services to such children and their families[,]" *Commonwealth v. Ritchie*, 502 A.2d at 151 (Pet. for Cert. 6a), the Court seemingly has ignored what the Commonwealth and others believe to be the *sine qua non* of the legislative purpose, increased reporting of suspected children abuse.

> It is the purpose of this Act to encourage more complete reporting of suspected child abuse and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse and providing rehabilitation services for children and parents involved so as to ensure the child's well being and to preserve and stabilize family life wherever appropriate.

11 P.S. §2202. The preeminence of reporting, and its legislative encouragement, is due largely to the fact that

> Protection for [victims of child abuse] is often possible only when a third person—a friend, a neighbor, a relative, or a professional—recognizes the child's danger and reports it to the proper authorities. Reporting begins the child protective process.[11]

The sketchy legislative history of the CPSL suggests that it was the Pennsylvania Legislature's intention originally to endorse a therapeutic approach to the pathology of child abuse.[12] Indeed, the purpose clause of the CPSL evidences that intent. In support of that purpose, the statute marshalls the resources of persons who, in the course of their employment, practice or

[11] Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill.L.Rev. 458, 464 (1978).

[12] *See, e.g.*, PA. SENATE JOURNAL at 926 (November 18, 1975).

profession, are obligated to report incidents of suspected abuse 11 P.S. §2204(c). In addition, "any person may make such a report . . [,]" *id.*, §2205: those persons doing so in good faith are guaranteed civil and criminal immunity, *id.*, §2211; reporting procedures are detailed, *id.*, §2206; certain privileged communications are abrogated to the narrow extent that they would impede the reporting function, *id.*, §2204(c); and, most importantly, the CPSL provides a qualified confidentiality for reports made pursuant to the law, *id.*, §2215.

It must be supposed that the limited confidentiality extended to such matter was based on the legislature's considered policy of encouraging those most close to suspected incidents of, for example, intra-familial sexual abuse to step forward, despite the potential risks, so that both the protective and rehabilitative functions of the CPSL could be engaged.

The legislature, in restricting access to CPSL reports, excepted the following: child protective service workers, treating physicians or hospital authorities, *guardians ad litem*, State Department of Public Welfare (DPW) officials, and courts of competent jurisdiction. *Id.* §2215(a)(1) through (5). In amendments which post-dated respondent's trial, the legislature expanded the number of persons, agencies, or other organizations to whom reports of suspected abuse could be referred.[13]

Law enforcement officials, *inter alia*, were now included among those persons or agencies granted conditional access to reports of suspected abuse made pursuant to CPSL.[14] By regulation, DPW has defined law

[13] Act 1982, June 10, P.L. 460, No. 163 §15(a)(6) through (11), (11 P.S. §2215(a)(6) through (11), Purdon, Supp. 1986).

[14] 11 P.S. §2215(a)(9), (10).

enforcement official to include a county district attorney.[15] Information referrals made to law enforcement officials are subject to the following conditions:

> (1) Referrals shall be made by the CPS to the District Attorney or other appropriate law enforcement official on forms provided by the Department.
>
> (2) Referrals shall be made if the initial review by the CPS gives evidence that the alleged abuse perpetrated by persons whether or not related to the child is one of the following:
>
> (i) Homicide.
>
> (ii) Sexual Abuse or exploitation.
>
> (iii) Serious bodily injury.
>
> (3) Referrals shall be made if the initial review by the CPS gives evidence that the alleged abuse is child abuse perpetrated by persons who are not family members.
>
> (4) If during the course of investigating a report of suspected child abuse, the CPS obtains evidence which indicates that referral to law enforcement officials is appropriate, the CPS shall immediately refer the report to the law enforcement official.
>
> (5) The CPS shall not refer to law enforcement officials reports of suspected child abuse which do not meet the requirements of paragraphs (2) and (3).
>
> (c) The CPS shall not provide information to a law enforcement official under this section, unless the law enforcement official has exhibited proper identification to the CPS.[16]

[15] 55 Pa. Code 3490.4, *published at* 15 Pa. B. 4554 (December 21, 1985).

[16] *Id.*, §3490.92.

Moreover, the following precautions are mandated:

> (a) The release, of data that would identify the person who made a report of suspected child abuse or person who cooperated in a subsequent investigation is prohibited, unless the Secretary finds that the release will not be detrimental to the safety of the person.
>
> (b) Prior to releasing information under subsection (a), the Secretary will notify the person whose identity would be released that he has 45 days to advise the Secretary why this anticipated release would be detrimental to his safety.[17]

The motivation for the 1982 amendments undoubtedly reflects a heightened sensitivity on the part of the state legislature to the frightening scope of child sexual abuse. The enactment of the amendments clearly signaled that the Pennsylvania General Assembly had modified its primary goal of therapeutic intervention to include a companion focus: recognition that family violence in general and child sexual abuse in particular were crimes, and that law enforcement intervention was appropriate.[18]

The Supreme Court of Pennsylvania, although ostensibly relying on the pre-amendment version of the CPSL, obviously was preoccupied with the access to child protective service records which it supposed the prosecution was now permitted under the 1982 amendments. *Commonwealth v. Ritchie*, 502 A.2d at 153, n.15 (Pet. for Cert. 11a). In view of that preoccupation, and in anticipation that respondent will contend that the 1982 amendments have reduced child protective service agencies to mere repositories of criminal information,

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[17] *Id.*, §3490.94; *see also* 11 P.S. §2215(c).

[18] PA. HOUSE JOURNAL at 1162 (May 5, 1982).

thus offering law enforcement officials *carte blanche* to confidential records, the Commonwealth considered itself obliged to review the pertinent amendments and implementing regulations.

It is our position that the amendments have not altered the policy underlying the purpose clause of the CPSL, the encouragement of more complete reporting of suspected child abuse. The confidentiality provision, when read in conjunction with the DPW regulations, evidences a measured and deliberate response to the varied, yet not incompatible, compelling state interests of protecting the child victim, shielding the privacy of the family, friends, or neighbors of a victim of child abuse, and the prosecution of serious child abuse, physical and sexual. The confidentiality provisions of CPSL protect those interests in a rational fashion, and the Commonwealth contends that the Sixth Amendment privileges of confrontation and compulsory process do not, under the facts of this case, require the heedless intrusion sanctioned by the Supreme Court of Pennsylvania.

The Pennsylvania Court's *per se* rule, that any defendant prosecuted for any offense involving the abuse of children has an absolute right to investigate CWS files in preparation for trial, is a needlessly drastic remedy. Unrestricted access, not just for prior statements of a victim or a witness, but for discovery of any information, whether material or not, exculpatory or not, gathered or developed in the course of the agency's investigation of the child, would permit counsel to uncover the necessarily raw, social service data gathered by child protective service caseworkers. Information, for example, regarding unrelated psychiatric or other counseling summaries concerning both family members and the

victim would become known. Of even graver concern to the Commonwealth, especially in cases involving the secret, shameful world of intra-familial sexual abuse, the identities of family members, friends, or neighbors who consented to be interviewed or who cooperated with the child protective service agency, as well as the identity of the individual whose report triggered agency intervention would be revealed. This so, whether or not the Commonwealth knew of, possessed, or employed such witnesses in a subsequent criminal prosecution. In the Commonwealth's view, a reporting system which is compromised to the extent urged by respondent and countenanced as constitutionally compelled by the Pennsylvania Court is seriously and dangerously flawed.

Such intrusions, we contend, will seriously hamper law enforcement in this unique and sensitive area. It is unrealistic to expect that the statutory anonymity of a person reporting his suspicions will be long preserved after it has been disclosed to counsel for a defendant. Notwithstanding the Pennsylvania Court's exhortation regarding the dissemination of confidential materials discovered in the wake of counsel's review, *Commonwealth v. Ritchie*, 502 A.2d at 153, N.16 (Pet. for Cert. 12a), the Commonwealth is not sanguine that witnesses will step forward freely when it becomes apparent that counsel for an accused will be granted unlimited access to the entire file maintained by the child protective service agency.

Although the precise issue before the Court is novel, several of its prior decisions suggest, we think analogously, that the disclosure order granting defense access to a presumptively confidential child protective service record is not compelled by the commands of the Sixth Amendment. Even assuming for the sake of

argument that the Commonwealth could routinely gain access to the confidential files of CWS, directly or indirectly, as the Supreme Court of Pennsylvania has presumed, *Commonwealth v. Ritchie*, 502 A.2d at 153, n.15, and further assuming, as respondent contended below, that the CWS records were in the effective possession or control of the prosecution (Brief for Appellee at 12-13, *Commonwealth v. Ritchie*), respondent would still not be entitled to disclosure of the prosecution's entire file.

> Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]

United States v. Bagley, _____ U.S. _____, 105 S.Ct. 3375, 3380 (1985) (relying on *United States v. Agurs*, 427 U.S. at 106). Although this Court has apparently reserved for later decision the question of the impact on traditional testimonial privileges of a defendant's right to compulsory process, the court expressly has declined to disapprove such privileges. *Washington v. Texas*, 388 U.S. at 23, N.21. The Court has instructed moreover, that the vaunted "right to every man's evidence" is always subject to exceptions embodied in constitutional, common-law, or statutory privileges. *United States v. Nixon*, 418 U.S. at 709. A reporter's identity in the child protective service scheme should therefore be as zealously guarded as the police informant's identity, protected by a state evidentiary privilege, in *McCray v. Illinois*, 386 U.S. at 313-14. *Cf., Cooper v. California*, 386 U.S. 58, 62, n.2 (1967) (prosecutor's failure to produce its informant to testify at trial, and thus to render him available for defendant's cross-examination, was not violative of the Confrontation Clause). Finally, it is

apparent that this Court, when privilege or confidentiality is asserted, considers indispensible an *in camera* procedure in view of the importance of "scrupulous[ly] protect[ing] against any release . . . of material not found by the court . . . properly admissible and relevant to the issues. . . ." *United States v. Nixon*, 418 U.S. at 714.

The *Ritchie* Court's remand order directing the trial court to review the records *in camera* and then to surrender the entire file to defense counsel so that he can second-guess the trial court's exercise of discretion usurps and degrades the traditional role of the court in evaluating the validity of such claims and in supervising the orderly admission and presentation of evidence in a criminal proceeding. Under such circumstances, the trial judge's role in "taking appropriate steps to insure against improper dissemination of sensitive material" is wholly and redundantly ceremonial. For what conceivable purpose would the trial court review the confidential records *in camera* if it were not to exercise its discretion in determining what relevant, material and exculpatory evidence should be surrendered to the respondent? There can be no doubt that the empty formality ordered by the Pennsylvania Court does not contemplate such an exercise.

The unseemly denigration of the trial court's role in evaluating the limited claim of privilege in the present case stands in stark relief to this Court's understanding generally of a trial court's responsibilities when faced with a claim of privilege. In *United States v. Nixon*, *supra*, the Court instructed:

> It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of

> material not found by the court at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought.

Id., 418 U.S. at 714. The Court also made it abundantly clear that it was within the discretion of the trial court to seek the aid, if necessary, of the contending parties for *in camera* consideration of potentially troublesome excisions, "whether the basis for the incision is relevancy or admissibility." *Id.* 418 U.S. at 715, n.21.

Although evaluating Sixth Amendment claims in the context of statutory privileges between sexual assault counselors and victims and psychologist-client relationships respectively, the Connecticut and Colorado Supreme Courts have recently announced decisions which the Commonwealth commends to this Court for their diversity of approach.

In *In re Robert H.*, *supra*, the Court elaborated an *in camera* procedure designed to protect both the confidentiality of the victim's communications with her sexual assault counselor and the accused's rights of confrontation, compulsory process, and due process. It is notable that the *in camera* procedure employed was not activated until the prosecution witness' direct testimony had been received.

> The trial court's in camera review of the victim's records, if she consents, shall not be limited to merely "relevant material." The trial court's in camera review of the sexual assault counselor's records should determine if there are any inconsistent and relevant statements of the victim in the records *when compared to the victim's direct examination.*

(Emphasis supplied).

* * *

> Relevant, inconsistent statements are only those statements which are verbatim accounts by the victim given to the counselor and which are directly related to an essential element of the crime for which the respondent is standing trial. Inconsistent, as it is used above, does not refer to a lack of *complete* uniformity in details as compared to trial testimony.

(Emphasis in the original).

* * *

> If the trial court denies or limits the disclosure of the contents of the records after following the above procedure, then the undisclosed material that is the subject of the respondents' request should be sealed for possible review on appeal.

Id., 509 A.2d at 484-85. *See also, State v. Storlazzi*, 191 Conn. 453, 464 A.2d 829 (1983).

In *People v. District Court*, _____ Colo. _____, 719 P.2d 722 (1986), on the other hand, the Court concluded that the trial judge erred in ordering pretrial production of records of therapy sessions involving the victim of sexual assault for its *in camera* review on the strength of the accused's Confrontation Clause claim. *Id.*, 719 P.2d at 724. The Court ultimately determined that the defendant's proffer "failed to make any particularized factual showing in support of his assertion that access to the privileged communications of the victim is necessary for the effective exercise of his right of confrontation." *Id.*, 719 P.2d at 727. It is noteworthy, too, that the Colorado Court firmly rejected the notion of a "balancing test" in the context of what it considered to be the absolute privilege existing between therapist and victim. *Ibid.*[19]

[19] The Commonwealth has not urged an absolute privilege regarding the confidential records at issue here.

In the preceding cases, the state courts relied on both the federal and their own state constitutions in analyzing the Sixth Amendment claims. In both cases the courts eschewed the position taken by the Supreme Court of Pennsylvania that in balancing "the types of protection that can be afforded a victim and one accused[,]" the scales must always tip in favor of the accused's privileges of confrontation and compulsory process. *Commonwealth v. Ritchie*, 502 A.2d 151 (Pet. for Cert. 8a). Manifestly the Pennsylvania Court's remand order fails to balance the competing interests of protecting the child victim during the pendency of the criminal proceedings, encouraging reports of suspected child sexual abuse, shielding the privacy of the victim and her family and guaranteeing the accused his constitutional right to present a defense.

The remand order directing disclosure of presumptively confidential files rests on erroneous interpretations of this Court's relevant confrontation, compulsory process, and due process decisions. And to the extent that the judgment below imposes—as a matter of federal constitutional law—greater restrictions on a compelling state interest than this court has been inclined to do, the order is similarly flawed. *Cf., Fare v. Michael C.*, 442 U.S. 707 (1979).

Conclusion

The Court is urged to rule that the Confrontation Clause does not compel the pretrial disclosure of unexpurgated, presumptively confidential child protective service records merely to permit a criminal defendant's lawyer to argue how the records might be used to cross-examining witnesses at trial "or in presenting other evidence." Similarly, the Court should rule that the accused may not invoke the privilege guaranteed by the Compulsory Process Clause for the purpose of breaching the confidentiality of such records, either before or during trial, on the strength of a speculative representation that the records might contain discoverable matter of potential use in preparing his defense. Further, the Court should rule that Pennsylvania's interest in identifying, protecting, and rehabilitating child victims of physical and sexual abuse stands in equal dignity with federal constitutional provisions which protect a criminal defendant's right to present a defense. Consequently, the Court should expressly reject the Supreme Court of Pennsylvania's conclusion that the Sixth Amendment's "counters" of confrontation and compulsory process invariably must be weighted against competing concerns, however compelling.

Finally, the Court should reaffirm the traditional prerogative of the judiciary to make preliminary, *in camera* determinations concerning disclosure of privileged matter and reject the Supreme Court of Pennsylvania's novel procedure of permitting defense counsel to undertake the initial review of the propriety of the trial court's exercise of discretion.

Accordingly, this Court should reverse the judgment of the Supreme Court of Pennsylvania and remand the case for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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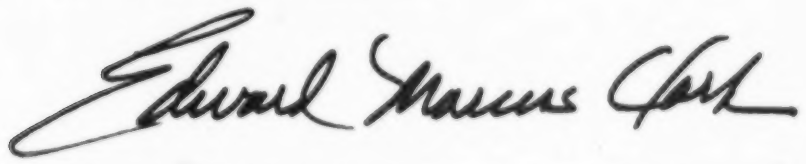

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